Nos. 03-343, 03-334

Supreme Court, U.S.
FILED
JAN 14 2004
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

SHAFIQ RASUL, *et al.*,

*Petitioners,*

*v.*

GEORGE W. BUSH, *et al.*,

*Respondents.*

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

*Petitioners,*

*v.*

UNITED STATES OF AMERICA, *et al.*,

*Respondents.*

*On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit*

## BRIEF OF 175 MEMBERS OF BOTH HOUSES OF THE PARLIAMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND* AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICI CURIÆ*[1]

Each of the *amici curiæ* is a serving member of one of the two Houses of Parliament of the United Kingdom of Great Britain and Northern Ireland: the House of Commons and the House of Lords.[2] Each regards the question before the Court[3] as an issue of fundamental importance to the individual rights not only of British nationals, residents, and refugees, but of all detainees in Guantánamo.

*Amici* assert neither the guilt nor innocence of those detained at Guantánamo Bay, and do not ask this Court to rule one way or another on any claim or charge that may be raised in future proceedings. *Amici* submit only that, under the rule of law, the detainees should be granted the due process safeguard of independent judicial review, and do not speculate as to the outcome of any such proceedings. As members of the Parliament of Westminster, *amici* have a duty to protect human rights and fundamental freedoms against the misuse of public power. They have a significant, legitimate interest in seeking to ensure that their fellow citizens and others be accorded the due process of law deeply rooted in Anglo-American legal and political heritage.[4]

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, nor did any party to the action before the Court, or any person or entity other than the undersigned *amici*, make a monetary contribution to the preparation or submission of this brief.

[2] All *amici* participate in this brief as parliamentarians, and not as former cabinet members, senior judges, serving bishops, or any other capacity they may occupy or have occupied.

[3] The question presented before the Court is: whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.

[4] *Amici* do not believe it is appropriate for them to opine on the measures taken or not taken by the executive branch of the United

*Amici* recognize the concern expressed in Rule 37(1) that unnecessary *amicus curiæ* briefs are a burden. Upon belief, this is the first time members of the Parliament of Westminster have submitted a brief to this Court. This brief reflects the profound concern they share for the central question before the Court.[5]

Their concern is not limited to the twelve individuals entitled to the international protection of the United Kingdom or to the nationals of other states detained without recourse to even the most basic legal rights. The exercise of executive power without possibility of judicial review jeopardizes the keystone of our existence as nations—namely, the rule of law—as well as the effective protection of human rights as a matter of international obligation. Accordingly, *amici curiæ* submit this brief in

States government. They acknowledge the constitutional authority generally of the executive branch to issue executive orders—a power similar to that of the British government to act under the Royal Prerogative. The Houses of Parliament scrutinize the manner in which the government exercises such powers, and Britain's courts review the lawfulness of government conduct under an increasing variety of circumstances, even when that conduct takes place under prerogative powers.

[5] Members of Parliament have repeatedly articulated these sentiments to Her Majesty's Government, which has committed diplomatic effort and resources to protect the due process rights of the detainees. Prime Minister Tony Blair assured the House of Commons that "[w]e will make active representations to the United States . . . to make absolutely sure that any such trial will take place in accordance with proper international law." 408 PARL. DEB., H.C. (6th ser.) (2003) 1151-52. Minister of State, Foreign and Commonwealth Office, Baroness Symons of Vernham Dean, assured the House of Lords that it is the Government's objective to "ensure that if any British nationals are detained at Guantánamo Bay and prosecuted, a fair trial takes place in accordance with generally recognised principles." 653 PARL. DEB., H.L. (5th ser.) (2003) 938. Members of Parliament have employed every potential avenue to voice concern for the British detainees and turn now to this Court as an alternative, independent route to ensure that due process is provided.



support of the petitioners Shafiq Rasul, *et al.*, and Fawzi Khalid Abdullah Fahad Al Odah, *et al.*

## CIRCUMSTANCES OF UNITED KINGDOM NATIONALS DETAINED IN GUANTÁNAMO

### The Factual Context

*Amici* submit the following facts to this Court to underscore the need for independent judicial examination of the factual and legal bases justifying the indefinite confinement, without trial, of the detainees in Guantánamo.[6] These untested facts are the only facts that have reached the public record. If complete and compelling information about the detainees is not available and before this Court, it is because the U.S. administration and military have kept this information secret for the past two years and excluded all detainees from the benefit of due process.[7]

In early January 2002, U.S. Armed Forces began transferring individuals held as prisoners overseas to the U.S. naval base at Guantánamo Bay, an area within the complete control and jurisdiction of the United States.[8] It is reported that approximately 660 prisoners from 42 coun-

[6] On this Court's consideration of facts and opinions, *see, e.g., Atkins v. Virginia*, 536 U.S. 304, 316 n.19-21 (2002) (acknowledging websites, newspaper articles, and polling data); *Groppi v. Wisconsin*, 400 U.S. 505, 510-12 (1971) (finding error in trial court's failure to take requested judicial notice of prejudicial pretrial publicity in misdemeanor case); *Muller v. Oregon*, 208 U.S. 412, 419-20 (1908) (recognizing Brandeis Brief on nonjudicial sources of opinion).

[7] The British detainees are fortunate to come from a country which, like the United States, is committed to openness. *Amici* note that we may never know even the identity of those detainees who are nationals of less democratic societies.

[8] Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418.

tries are being held at Guantánamo.[9] Throughout this time, they have not been charged, have not been allowed to challenge their confinement, have not been permitted to consult with legal counsel of their choice and, most importantly, have not been able to have the legality of their detention reviewed by any impartial tribunal.

**The British Detainees**[10]

The U.S. military is believed to hold the following ten British nationals, one British resident and one British refugee among the prisoners at Guantánamo.

***Shafiq Rasul, Asif Iqbal, and Rhuhel Ahmed***

Of the 12 British detainees, two, Shafiq Rasul and Asif Iqbal, are petitioners in Rasul v. Bush, No. 03-343. Together with Rhuhel Ahmed, they share common circumstances: all deny ever being in Afghanistan as combatants. British media sources suggest that they were seized in Pakistan in December 2001 and turned over to U.S. forces at Shebergan, northern Afghanistan, by Northern Alliance fighters seeking rewards from U.S. authorities.[11] The three are friends from Tipton, in the West Midlands in England.

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[9] *See, e.g.*, Mark Bowden, *The Persuaders*, OBSERVER (London), Oct. 19, 2003, *available at* LEXIS, News Library, OBSRVR File; David Rohde, *Threats and Responses: The Detainees*, N. Y. TIMES, Oct. 29, 2002, *available at* LEXIS, News Library, NYT File.

[10] Note that, for simplicity's sake, *amici* refer to the following prisoners as British based on their ties to the United Kingdom and regardless of whether they are technically British citizens or residents.

[11] Tania Branigan & Vikram Dodd, *The Bitterest Betrayal*, GUARDIAN, July 19, 2003, *available at* LEXIS, News Library, GUARDN File. There is no doubt that the United States offered "substantial monetary rewards" for "bad folks" captured in Afghanistan at this time—Secretary of State Donald H. Rumsfeld stated that leaflets announcing the rewards were "dropping like snowflakes . . . in December in Chicago." Donald H. Rumsfeld, News Briefing, (Nov. 19, 2001), *available at* United States Department of Defense, http://www.defenselink.mil/news/.



Asif Iqbal was 20 years old in 2001. Both of Iqbal's parents are of Pakistani heritage—his father moved to England 41 years ago and his mother 25 years ago. His parents traveled to Pakistan in July 2001 to find a bride for him. Iqbal first traveled to Pakistan in September 2001 to join his father in his family's home town near Karachi.[12] In early October, after arranging the marriage, Iqbal told his father that he was traveling to Karachi to meet friends and would return in a week.[13] The last time Iqbal spoke with his family, he telephoned his father from Karachi to inform him of his safe arrival.[14]

Rhuhel Ahmed, who was 20 at the time of his capture, was a friend of Iqbal at Alexandra High School in Tipton.[15] In early October 2001, Ahmed traveled to Pakistan to help with Iqbal's wedding. Three and a half months later, on January 26, 2002, his family learned he was being held in Guantánamo Bay.[16]

Shafiq Rasul was 24 in 2001, and was another of Iqbal and Ahmed's friends from Tipton.[17] Rasul had briefly studied law,[18] and was thinking of going to Pakistan to visit relatives, learn Punjabi, and benefit from a computer course there that was less costly than in England.[19] In mid-September 2001, Rasul went to Lahore, Pakistan.[20] He contacted his family in October 2001 but was not heard from again.

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[12] Rajeev Syal, *Families of Camp X-Ray Detainees Living in Fear of a Racist Backlash*, DAILY TELEGRAPH (London), Feb. 2, 2002, *available at* LEXIS, News Library, TELEGR File.

[13] Branigan & Dodd, *supra*, note 11.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Ian Burrell, *Britons at Camp Delta Make a Sorry Bunch of Warriors*, INDEPENDENT (London), Aug. 3, 2002, *available at* LEXIS, News Library, INDPNT File.

[19] Branigan & Dodd, *supra*, note 11.

[20] Syal, *supra*, note 12.

***Jamal Udeen***

Jamal Udeen is a 35 year old web designer from Manchester, England, and the son of Jamaican parents.[21] He was away from home only three weeks when U.S. forces came across him in a prison in Kandahar, Afghanistan.[22]

Udeen told reporters in December 2001 that he was passing through Afghanistan on his way to Iran but was detained near the Afghan border by Taliban soldiers who saw his British passport and accused him of being a spy.[23] He was taken to Kandahar Central Prison and tortured by Taliban forces.[24] The British Foreign and Commonwealth Office informed Udeen's sister that he would return to England once his passport was located.[25] His family discovered, through media reports, that he was transported to Guantánamo in February 2002.[26]

***Bisher Al-Rawi and Jamil Al-Banna***

Al-Rawi and Al-Banna are British residents who were never close to any zone of military operations. They were originally arrested and accused of associating with terrorist groups upon arrival at Banjul Airport, Gambia in November 2002 by the Gambian National Intelligence Agency.[27] Al-Rawi, an Iraqi citizen, had been a U.K. res-

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21 Burrell, *supra*, note 18.

22 Scott Johnson, *Trapped in Prison: Foreigners Jailed by the Taliban Still Waiting for Safe Passage Out of Afghanistan*, NEWSWEEK WEB EXCLUSIVE, Dec. 18, 2001, *at* http://www.msnbc.msn.com/Default.aspx?id=3067352&p1=0 (Jan. 11, 2004); Branigan & Dodd, *supra*, note 11.

23 Branigan & Dodd, *supra*, note 11; *Briton Among Thousands of Taliban Prisoners*, GUARDIAN, May 12, 2002, *available at* LEXIS, News Library, GUARDN File.

24 Branigan & Dodd, *supra*, note 11.

25 *Id.*

26 British Broad. Corp., *At-a-Glance: Guantanamo Bay Britons* (July 23, 2003), http://news.bbc.co.uk/1/hi/uk/3089395.stm.

27 David Rose, *Guantánamo Bay on Trial*, VANITY FAIR, Jan. 2004, at 88, 134.



ident for 19 years,[28] and Al-Banna, a Jordanian refugee resident in England,[29] were among a group of four men, all based in the United Kingdom, who were in Gambia in connection with a peanut-oil processing venture.[30]

Al-Rawi and Al-Banna were held incommunicado in Banjul for approximately two months. They were reportedly questioned by U.S. investigators into whose custody they were delivered without judicial process or extradition proceedings.[31] They were transferred to Bagram Air Base, Afghanistan, in early January 2003—and from there to Guantánamo Bay—despite a habeas corpus petition pending in the Gambian courts.

***Moazzem Begg***

Moazzem Begg is a language teacher, law student and devout Muslim who lived in Birmingham, England.[32] He moved his family to Afghanistan in 2000 to conduct charity work and help establish an Islamic school.[33] In the fall

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28 *Id.*; Patrick Wintour, *Frantic efforts to bring home Britons held in Cuba as Blair's US trip looms*, GUARDIAN, July 12, 2003, *available at* LEXIS, News Library, GUARDN File. Al-Rawi and his family fled Iraq to escape the regime of Saddam Hussein. The rest of the family took out British nationality, but Al-Rawi retained his Iraqi nationality in order to preserve his claim to property stolen from him upon the long-anticipated fall of Hussein. Clearly he could not depend upon then-President Hussein to assert his interests to the United States between the time of his arrest and the moment of Hussein's fall.

29 *Id.* To obtain refugee status in the United Kingdom, Al-Banna would have had to demonstrate that he had a well-founded fear of persecution in his country of origin, Jordan. *See* Convention Relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267. Like Al-Rawi, Al-Banna cannot depend on his government to defend his interests.

30 Rose, *supra*, note 28.

31 *Id.*

32 Paul Harris & Burhan Wazir, *Briton tells of Ordeal in Bush's Torture Jail*, OBSERVER (London), Dec. 29, 2002, *available at* LEXIS, News Library, OBSRVR File.

33 *Id.*

of 2001, as U.S. and U.K. forces entered Afghanistan, Begg fled with his wife and family to Pakistan.[34] He was kidnapped in February 2002 by unknown persons, bundled into a car and smuggled back over the border into Afghanistan, first to Kandahar and then to Bagram.[35] His wife immediately informed relatives in England, who sought assistance from the British government and filed a habeas corpus petition in a Pakistani court.[36] The Pakistani government denied that Begg was in their custody. Begg was held by U.S. forces in Afghanistan for a year after his kidnapping and prior to his transportation to Guantánamo Bay in the spring of 2003.[37]

***Tarek Dergoul***

Tarek Dergoul is a 25 year old care worker from East London.[38] Unlike the other British prisoners, unconfirmed reports indicate that he may have been involved in hostilities, and was captured in the Tora Bora mountain complex in Afghanistan to which retreating Al-Qaida forces had fled.[39] Dergoul, who was born in Britain and is the son of a retired Moroccan baker, had told his family in May or June 2001 that he was flying to Pakistan to learn Arabic.[40] His whereabouts were a mystery for many months.[41] In May 2002, his family learned that he was held in Guantánamo Bay.[42]

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34 *Id.*

35 *Id.*

36 Audrey Gillan, *Pakistani intelligence and Americans 'abduct' Briton*, GUARDIAN, Mar. 9, 2002, *available at* LEXIS, News Library, GUARDN File.

37 Sandra Laville, *Father Appeals for Son Held in Guantanamo*, DAILY TELEGRAPH (London), Nov. 19, 2003, *available at* LEXIS, News Library, TELGR File.

38 Burrell, *supra*, note 18.

39 *Id.*

40 *Id.*

41 Branigan & Dodd, *supra*, note 11.

42 *Id.*



***Tariq Mahmud***

Tariq Mahmud is a taxi driver from Birmingham, where his wife and two children continue to live. Mahmud is believed to hold dual British and Pakistani citizenship.[43] Mahmud reportedly left Britain several years ago, moving to Islamabad after spending time in Afghanistan. Thought to be in his 30s, Mahmud is understood to have been arrested near Islamabad, Pakistan as part of an international operation orchestrated by American and Pakistani officials.[44] Sources suggest that Mahmud was kidnapped from Pakistan—picked up by the Americans to gather evidence against another Birmingham man, Moazzam Begg, whose arrest mirrors that of Mahmud's.[45]

Mahmud is included by *amici* because his name has been linked to Guantánamo Bay.[46] Such is the lack of due process in this case that his parents, who live in Birmingham, do not know the whereabouts of their son.[47]

***Feroz Abbasi***

Feroz Abbasi was born in Uganda and moved to Britain with his parents at the age of eight.[48] The family settled in the London suburb of Croydon, where Abbasi attended high school.[49] He subsequently took a two-year computing course at Nescot College in Epsom, England and was

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43 British Broad. Corp., *Briton 'Arrested Over Terror Links'* (Oct. 30, 2003), *available at* http://news.bbc.co.uk/1/hi/england/west_midlands/3226315.stm.

44 *Id.*

45 *Id.*; Kim Segupta, *Briton Held in Pakistan on Terror Charges*, INDEPENDENT (London), Oct. 30, 2003, *available at* LEXIS, News Library, INDPNT File.

46 Lisa McCarthy, *Release Hopes for Terror Suspects*, BIRMINGHAM EVENING MAIL, Jan. 9, 2004, *available at* LEXIS, News Library, BEMAIL File.

47 Segupta, *supra*, note 45.

48 British Broad. Corp., *From Student to Terror Suspect* (Jan. 21, 2002), http://news.bbc.co.uk/1/hi/uk_politics /1773477.stm.

49 *Id.*

known as a courteous, well-behaved student.[50] Abbasi turned to the study of the Koran and the Muslim faith after he was mugged in Switzerland.[51] He traveled to Afghanistan in December 2000, apparently for religious reasons.

Abbasi was taken into custody by U.S. forces in northern Afghanistan in December 2001.[52] His movements prior to being seized are not known, nor is it known how or where he was surrendered to U.S. forces by the Northern Alliance. Subsequently, he was flown—hooded and shackled—to what was then Camp X-Ray at Guantánamo Bay.[53] Abbasi's mother has stopped receiving correspondence from him,[54] and he was reportedly diagnosed by a U.S. military forensic psychiatrist as suffering from depression.[55] News reports reveal that while in Guantánamo he tried to hang himself with a towel—one of the few possessions allowed in the detention center.[56]

***Martin Mubanga***

Martin Mubanga is a 29 year old motorcycle courier from North London.[57] He is the son of a former Zambian

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50 *Id.*

51 *Id.*

52 Sean O'Neill, *Feroz Abbasi*, DAILY TELEGRAPH (London), May 5, 2003, *available at* LEXIS, News Library, TELEGR File.

53 *Id.*

54 Julian Borger & Vikram Dodd, *Cuba Britons 'admit war crimes'*, GUARDIAN, Aug. 12, 2003, *available at* LEXIS, News Library, GUARDN File.

55 Vikram Dodd, *Guantanamo Bay Detainee Suffers From Depression*, GUARDIAN, Nov. 18, 2003, *available at* LEXIS, News Library, GUARDN File.

56 *Suicide Bid By Brit Held in Cuba*, DAILY RECORD, July 12, 2003, *available at* LEXIS, News Library, RECORD File. *See also* Rose, *supra*, note 27 at 91.

57 News24, *Sixth Briton Held at Guantanamo*, (Dec. 5, 2002), *at* http://www.news24.com/News24/USAttack/0,,2-1195_1183374,00.html (Jan. 11, 2004).



government official whose family moved to Britain in the 1970s. He was taken into custody in Zambia by local authorities in March 2002. It is thought that he was held by the Zambian authorities for some time before being handed over to U.S. authorities. A Foreign and Commonwealth Office official stated that consular access and information were requested while Mubanga was detained in Zambia, but that request was refused.[58] He was subsequently surrendered to U.S. officials and transported to Guantánamo Bay.[59]

***Richard Belmar***

Richard Belmar is a former post office worker from north London.[60] He became a Muslim during his teenage years, following the lead of his elder brother. In June 2001 Belmar traveled to Pakistan on a six-week study trip.[61] He called his family twice from Pakistan, telling them that he enjoyed the culture and intended to extend his stay.[62] Belmar's parents received a letter from him in October 2002, saying that he had been arrested in Pakistan eight months prior for over-staying his visa.[63] He was apparently never in Afghanistan. Between October and December of 2002, the British Foreign and Commonwealth Office informed Belmar's parents that Belmar had been taken to Guantánamo Bay where he had been seen by British officials.[64]

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58 *Id.*

59 *Id.*

60 Hala Jaber & Gareth Walsh, *Former Catholic Schoolboy in Al-Qaeda Camp*, TIMES (London), Dec. 29, 2002, *available at* LEXIS, News Library, TIMES File.

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

## SUMMARY OF ARGUMENT

The United Kingdom and the United States share an unshakeable commitment to the rule of law. Recourse to an independent and impartial tribunal is required by the rule of law, especially when the justification for detention is contested or uncertain. Independent judicial review is the product of over three centuries of constitutional development in both of our countries, beginning with the struggle between the monarchy and Parliament in Civil War England and embodied in the U.S. Constitution. The international rule of law is anchored in the treaties by which both nations are bound.

*Amici* respectfully submit that this Court should preserve the judiciary's vital role to insure that executive actions violate neither the Constitution of the United States of America nor the international rule of law and human rights.

Our nations share a unique historical bond, one that was forged in the Parliamentary achievements of the English Civil War and articulated in the Petition of Right and the English Bill of Rights. In its early years, America relied on that legal inheritance, rather than on abstract principles of natural law, in defining the scope of its laws. The Framers created a government of laws rather than of men, manifesting their intent to place the principle of legality above all others. *Amici* urge this Court to assert its constitutional role to ensure that the division of powers so carefully crafted by the Framers is not altered in a way prejudicial to the present, proud commitment to the rule of law.



## ARGUMENT

### I. THE DETAINEES' CASES PRESENT DISPUTES WHICH CAN ONLY BE FAIRLY DETERMINED BY AN IMPARTIAL AND INDEPENDENT COURT

#### A. The Circumstances Justifying Detention Are Unproven And Subject To Dispute

There is no mechanism in place or being followed to ensure that the circumstances of these detentions meet even the most basic standards of due process or human rights. The rule of law requires reasonable due process to ascertain the bases asserted in support of prolonged detention as well as the veracity of the facts that support those bases. Indefinite detention without charge represents a violent departure from principles underlying our common legal heritage.[65]

The detention center at Guantánamo was designed, according to the U.S. Administration, to house "the worst of the worst" and "hardest of the hardcore."[66] Yet, other

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[65] Notwithstanding the situation in Guantánamo, the U.S. Administration recognizes the need to act in conformity with the rule of law and with international law: "It is the policy of the United States Government to pursue human rights and the rule of law as a central element of foreign policy. The U.S. approach to countering terrorism does not conflict with or violate this policy." AMNESTY INT'L, *United States of America – The Threat of a Bad Example* 1 (Aug. 2003), *at* http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AMR511142003ENGLISH/$File/AMR5111403.pdf, *quoting* Letter to Amnesty Int'l Sec'y Gen. Irene Khan, dated 11 July 2003, from Lorne W. Craner, Ass't Sec'y for Democracy, Human Rights and Labor, U.S. Dep't of State (July 11, 2003). Commenting on the United States' efforts in the war on terrorism, the Pentagon General Counsel noted that the administration will not "compromise its commitment to human rights in accordance with the law" in "the conduct of this war against a ruthless and unprincipled foe." Letter from William J. Haynes II, Gen. Counsel, Pentagon, to Sen. Patrick Leahy (June 25, 2003), *at* http://www.hrw.org/press/2003/06/letter-to-leahy.pdf.

[66] Secretary Rumsfeld Roundtable with Radio Media (Jan. 15, 2002), *available at* United States Department of Defense, http://www.

statements by the administration suggest that Guantánamo holds no high ranking terrorist of any significance.[67]

On the face of the facts as they are known, there is nothing to indicate any basis for detaining any of the British detainees. Some of the detainees appear to have been innocently caught up in the Afghan conflict.[68] In addition, many were seized in foreign countries, some far from the Afghan hostilities.[69] *Amici* know nothing more about the various detainees than is summarized above because U.S. authorities assert the power to detain them with no outside scrutiny whatsoever, whether by the 42 States from which they hale, or the U.S. courts.[70] These circum-

defense link.mil/transcripts/2002/t01152002_t0115sdr.html (last visited Jan. 9, 2004). White House Press Report: Argentina, Philippines, Guantanamo, South Asia (Jan. 16, 2002), *available at* United States Department of State http://usinfo.state.gov/regional/nea/sasia/afghan/text/0116wthsrpt.htm (last visited Jan. 9, 2004).

[67] *See* Bob Drogin, *No Leaders of Al Qaeda Found at Guantanamo*, L.A. TIMES, Aug. 18, 2002 *available at* LEXIS, News Library, LAT File (quoting anonymous U.S. intelligence official's statement that inmates at Guantanamo "are mostly 'low and middle-level' fighters . . . not 'the big-time guys'").

[68] For example, Jamel Udeen was attempting to travel across Afghanistan in September 2001 when he was arrested and tortured by the Taliban as a British spy, then abandoned in a Kandahar jail where U.S. forces found him some months later.

[69] Richard Belmar, Shafiq Rasul, Asif Iqbal, Rhuhel Ahmed, Bisher Al-Rawi, Jamily Al-Banna, Moazzem Begg, Tariq Mahmud, and Martin Mubanga.

[70] Justice Anthony M. Kennedy has stated that "[a]s a profession, and as a people, we should know what happens after the prisoner is taken away" in recommending that prison reform was a proper concern for the entire legal profession, and not only for its criminal law practitioners. Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) (transcript available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html). *Amici* believe that the situation in Guantánamo is equally deserving of our interest because affirming the court below would deny this Court's constitutional role.



stances require an objective judicial determination to safeguard minimal levels of due process and human rights.

### B. The Legal Justifications For Detention Are Ambiguous And Also Subject To Dispute

Similarly, the reported facts raise serious legal issues deserving judicial scrutiny. If, as reported, several U.K. nationals detained in Guantánamo were seized in foreign countries in return for favors by the United States or in violation of due process, they are potentially held in Guantánamo in violation of local and international law. An initial breach of international law by one state in relation to a foreign national does not relieve a second state of its international obligations in respect of those same nationals. Furthermore, no state's domestic legislation can excuse that state or another from strict compliance with its own international obligations.[71]

Martin Mubanga, a U.K. citizen and the son of a former Zambian government official, was detained by the Zambian government and summarily surrendered to U.S. authorities before the circumstances of his original detention were established or tested. Al-Banna and Al-Rawi were both detained by the Gambian government and turned over to the U.S., despite a habeas corpus petition pending on their behalf. Tariq Mahmud and Moazzem Begg were apparently kidnapped in Pakistan in violation of Pakistan's domestic laws and Pakistan's international legal obligations to the U.K. The circumstances of Shafiq Rasul and Asif Iqbal are set forth in other briefs to this Court, but it merits noting that they and detainee Rhuhel Ahmed were apparently first seized by Northern Alliance fighters eager to earn favors from U.S. authorities.[72]

[71] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 451-52 (5th ed. 1998); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 320 (1987).

[72] Rose, *supra*, note 27 at 134.

The court below noted that the situation of prisoners of war detained by armed forces in the middle of hostilities limits the rights available to those detained.[73] However, even if some of the British prisoners were detained in the theatre of military operations, and beyond the protection of *constitutional* due process,[74] the grounds for denying them due process must have long ago expired two years later and six thousand miles away in an area under no military threat and under the complete dominion of the U.S. government.[75]

## II. INDEFINITE EXECUTIVE DETENTION WITHOUT JUDICIAL REVIEW IS INIMICAL TO THE UNITED STATES' COMMITMENT TO THE RULE OF LAW AND ITS INTERNATIONAL OBLIGATIONS

### A. The United Kingdom And The United States Share A Common History And Tradition Of Judicial Review Of Executive Power

In establishing a tripartite separation of powers and a truly independent judiciary, the Framers were aware of,

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73 *Al Odah v. United States*, 321 F.3d 1134, 1139-40 (D.C. Cir. 2003).

74 Even those captured in the course of military operations are entitled to the protections set out in the Geneva Conventions. *See* 1949 Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3365; 1949 Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, *adopted* June 8, 1977, 1125 U.N.T.S. 3.

75 *See Ex Parte Milligan*, 71 U.S. 2 (1866) (holding that "[a]s necessity creates the rule, so it limits its duration . . . Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."). Ironically, U.S. courts have jurisdiction to adjudicate claims of defendants arrested abroad and forcibly brought to the United States for purposes of prosecution. *See, e.g., United States v. Rezaq*, 134 F.3d 1121, 1132 (D.C. Cir. 1998); *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (examining "norms of customary international law" and upholding extraterritorial jurisdiction under Federal Hostage Taking and Air Piracy statutes).



and could look to, Parliament's prior achievements to subject the will of the Sovereign to the rule of law.[76] In 1627, Charles I, who had been collecting forced loans from his subjects, imprisoned five knights in the Tower of London who refused to comply with the royal "request." They sought release through writs of habeas corpus. When the King returned the writ, he did not state that the knights had refused to loan him funds, but instead stated that they were each held "by special command of his majesty (*per speciale mandatum regis*)."[77] The court affirmed the King's absolute prerogative and denied the knights' petitions.

Parliament responded by forcing the King to sign the Petition of Right of 1628, which referenced the Magna Carta and asserted that no person should be subject to arbitrary arrest or imprisonment.[78] The King ultimately accepted the Petition and it thereby became part of the law inherited by the American colonies.

Almost 40 years later, Parliament again acted to secure the freedom of the individual from arbitrary detention. During the English Civil War, the British created their own version of Guantánamo Bay and dispatched undesirable prisoners to garrisons off the mainland, beyond the reach of habeas corpus relief. In 1667, Edward Hyde, First Earl of Clarendon, was impeached, in part for his role in procuring the illegal imprisonment of political offenders in remote and unknown places.[79] In 1679, Par-

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76 "For I agree, that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'" THE FEDERALIST NO. 78 (Alexander Hamilton) (quoting CHARLES DE MONTESQUIEU, THE SPIRIT OF THE LAWS). *See also Marbury v. Madison* for the proposition that constitutional limitations on government authority can be safeguarded only by the judiciary. 5 U.S. 137 (1803).

77 BERNARD SCHWARTZ, THE ROOTS OF FREEDOM: A CONSTITUTIONAL HISTORY OF ENGLAND 133 (1967).

78 PETITION OF RIGHT, 1628, art. III.

79 THOMAS PITT TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME 594 (10th ed. 1946).

liament passed the Habeas Corpus Act foreclosing that potential for abuse.

In April 1689, almost a century before the Framers gathered in Philadelphia, William and Mary of Orange were crowned King and Queen after swearing obedience to the laws of Parliament and reading the Bill of Rights as part of their oaths.[80] As a precursor to the American Bill of Rights, the English Bill of Rights established strict limits on the Sovereign's legal prerogatives, including a prohibition against arbitrary suspension of Parliament's laws.[81] It also established the fundamental constitutional principle of Parliamentary supremacy and made the executive fully accountable to Parliament and the courts, often referred to as the rule of law. Among other things, under the rule of law the existence or non-existence of a power or duty is a matter of law, and it is for the courts to determine whether a particular power exists, define its ambit, and provide an effective remedy for its unlawful exercise.[82] The English Bill of Rights also added other rights: the King was forbidden from establishing his own courts or acting as a judge, and the courts were forbidden from imposing excessive bail or fines, or cruel and unusual punishments.

The Framers built on this common tradition and drafted a Constitution that institutionalized the separation of powers and subjected the Legislature and the Executive to the rule of law.[83] This Court has repeatedly acknowl-

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[80] ENGLISH BILL OF RIGHTS, 1689.

[81] ENGLISH BILL OF RIGHTS, 1689, art. I.

[82] 8(2) HALSBURY'S LAWS OF ENGLAND (4th ed., 1996), Constitutional Law and Human Rights ¶6.

[83] Even before the U.S. declared its independence, Maryland's General Assembly passed an Act for the Liberties of Peoples (1639). In 1641, the Massachusetts Body of Liberties was adopted and arguably became the first "American attempt" to enumerate "fundamental rights . . . in a written instrument enacted by the people's representatives." BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 71 (1971).



edged that the English Bill of Rights inspired many of the central provisions of the Constitution.[84] These historical limits on arbitrary executive power in England, the development of American constitutional law, and the corresponding growth of individual liberty on both sides of the Atlantic, have, since those early days, inspired impressive contributions by the U.S. to the development of international human rights and freedoms.

### B. Both Countries Have Played Seminal Roles In The Development Of The International Rule Of Law And Human Rights

In the wake of the First World War, the United States played a prominent role in drafting the Statute and Protocol of the Permanent Court of International Justice ("PCIJ"), foreshadowing a pattern of international participation in the creation and formulation of international law.[85] The governments of the United States and of the

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[84] "The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history." *Hurtado v. California*, 110 U.S. 516, 530 (1884). *See also Duncan v. Louisiana*, 391 U.S. 145, 151-52 (1968) (noting that a jury trial, expressed in the English Bill of Rights to protect against arbitrary rule, came to America with English colonists); *United States v. Johnson*, 383 U.S. 169, 178 (1966) ("Since the Glorious Revolution in Britain . . . the privilege [of the Speech and Debate Clause] has been recognized as an important protection of the independence and integrity of the legislature"); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 669 (1965) (Black, J., dissenting) ("It was in Magna Carta, the English Bill of Rights, and other such charters of liberty, that there originally was expressed in the English-speaking world a deep desire of people to be able to settle differences according to standard, well-known procedures . . ."); *In re Groban*, 352 U.S. 330, 351 n.32 (1957) (Black, Warren, Douglas & Brennan, JJ., dissenting) (surveying British law to clarify the right to counsel during an investigatory procedure).

[85] Notwithstanding the fact that the Senate failed to endorse the PCIJ'S terms, American participation in the formulation of international law was not hampered: a Judge of U.S. citizenship served on the bench of the PCIJ throughout its lifetime. Rosalyn Higgins, *The*

United Kingdom also contributed significantly to the drafting of the Universal Declaration of Human Rights ("UDHR") and the International Covenant on Civil and Political Rights ("ICCPR").[86] The governments of both nations signed and ratified the ICCPR, the Convention Against Torture,[87] and the Geneva Conventions, as well as regional international human rights treaties.[88] These international treaties not only reflect many of the constitutional laws of the United States and the United Kingdom, but also general international law and the values of our shared political and legal tradition.[89] The human

*ICJ, the ECJ, and the Integrity of International Law*, INT'L & COMP. L.Q. 52.1(1) (2003).

[86] The United States signed the ICCPR in 1977, ratified it in 1992, and made reservations that Articles 1 through 27 were not self-executing. ICCPR Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368. Notwithstanding those reservations, the United States, which includes the judiciary, has an obligation under the ICCPR itself and customary international law, as reflected in Article 18 of the Vienna Convention on the Law of Treaties ("VCLT"), to "refrain from acts which would defeat the object and purpose of a treaty." VCLT, 8 I.L.M. 679 (1969); RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised) § 314 (Tentative Draft No. 1, 1980); Michael J. Glennon, *The Senate Role In Treaty Ratification*, 77 AM. J. INT'L L. 257 (1983). *See also Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116, 1161-62 (C.D. Cal. 2002) (referring to an un-ratified treaty as evidence of the content of customary international law).

[87] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 I.L.M. 1027 (1984).

[88] *See, e.g.*, Inter-American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673 ("American Convention"); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 ("ECHR").

[89] These values include the obligation undertaken by States to ensure that: (i) no one is subject to arbitrary arrest, detention or exile. *See, e.g.*, UDHR, Dec. 10, 1948, art. 9, G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810; American Declaration of the Rights and Duties of Man, May 2, 1948, art. XXV, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc. 6 rev.1 (1992) ("American Declaration"); (ii) anyone who is



rights and fundamental freedoms they protect are also inherent in our common humanity and our democratic systems of government under law. The judiciary must protect from an abuse of executive power even those interests which arise under international law—as noted by the Framers of the Constitution.[90]

Should the judiciary fail to fulfill its responsibility to determine the legality of the British prisoners' detention, there would exist a prison for indefinite detention functioning in total secret, under the unchallenged exclusive control of the executive branch of the U.S. government. That result offends the United States' domestic and international commitment to basic due process and human rights.

detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him. *See, e.g.*, American Convention, art. 7; ICCPR, art. 14; (iii) anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. *See, e.g.*, American Convention, art. 7; ICCPR, art. 9; (iv) all persons are equal before the law and entitled without any discrimination to the equal protection of the law. *See, e.g.*, UDHR, art. 7; ICCPR, art. 26; and (v) every accused person is presumed to be innocent until proved guilty. *See, e.g.*, UDHR, art. 11; American Declaration, art. XXVI; ICCPR, art. 14.

[90] Alexander Hamilton commented on the proper scope of judicial review and the importance of international law:

> As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility. . . . But it is at least problematical, whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the lex loci, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations of a treaty or the general law of nations.

THE FEDERALIST No. 80 (Alexander Hamilton).

### C. Past Deviations From The Rule Of Law And International Obligations In Times Of National Crises Are Embarrassing Episodes In Our Respective Histories

Courts have a duty to vindicate the rule of law when it is circumvented or abused by legislative or executive fiat. History harshly judges attempts to detain individuals beyond the reach of the rule of law even in times of crisis. Japanese-American internment during the Second World War has become the paradigm for the pitfalls of judicial deference to arbitrary executive detention. The U.K. had its regrettable equivalent to the military order used to imprison Fred Korematsu. Under the auspices of Section 18B of the Wartime Defence Regulation, approximately 27,000 persons were detained between 1939 and 1945 in the U.K without charge, trial, or set term.[91] This abuse of executive power allowed arrest and detention on the Home Secretary's "reasonable belief" that an individual posed a threat to the nation—judicial deference was presumed. The most conspicuous case thereunder, *Liversidge v. Anderson*, also provides the most vigorous and insightful dissent. 1942 A.C. 206 (1941). Expressing his deep concern to safeguard the role of the judiciary in the scheme of the government, Lord Atkin stated, "in this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace." *Id.* at 244. Lord Atkin's comments, largely disfavored by his fellow Law Lords, are now universally viewed as an accurate reflection of the rule of law even in times of war.[92]

[91] Numbers cannot be confirmed because authorities refuse access to many papers. ALFRED W. B. SIMPSON, IN THE HIGHEST DEGREE ODIOUS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN 422 (1992).

[92] *Amici* do not opine on how this Court should balance the exigencies of "war or public danger" with the interest of due process when it comes to ruling on what process is due under the circumstances. Nevertheless, as one prominent U.S. jurist has commented, the rule of law is never *completely* silent. *See* Chief Justice William H. Rehnquist, Remarks at 100th Anniversary Celebration of the Norfolk and Portsmouth Bar Association (May 3, 2000) (transcript *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_05-03-00.html). This suggests that the judiciary must at least take jurisdiction in this case.



The U.K.'s recent experience with terrorism is equally instructive. In answering charges that it violated the human rights of Irish citizens held in the U.K. because of suspected involvement in terrorism, the U.K. government claimed that it was compelled to take severe measures. However, the powers of detention exercised over suspected Irish terrorists were eventually criticized by the European Court of Human Rights as disproportionate violations of human rights.[93]

Such examples stand out "as a caution that in times of distress the shield of military necessity and national security must not be used to protect government institutions from close scrutiny and accountability."[94] Moreover, these examples from both the U.S. and U.K. are no more shocking than the situation in Guantánamo, where detainees have been precluded from even being informed of the grounds for their detention or having their rights brought before any court of law.[95]

[93] *Brannigan & McBride v. United Kingdom*, 258 Euro. Ct. H.R. (ser. A) (1993); *Brogan, et al. v. United Kingdom*, 11 Eur. H.R. Rep. 117 (1989). The Good Friday Agreement of 1998 sought to redress those violations by providing for a specialized tribunal to deal with human rights reforms, and for changes in policing and the courts. Agreement Reached in the Multi-Party Negotiations, Apr. 10, 1998, 37 I.L.M. 751 (1998).

[94] *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

[95] The U.K. has its own anti-terrorism measures: the Anti-terrorism, Crime and Security Act 2001 (ATCSA). The ATCSA was enacted on December 14, 2001 and provides for detention of only non-U.K. nationals. As harsh as the law and the executive decisions made thereunder may be, neither evade judicial scrutiny. ATCSA provides for judicial review of executive determinations that a person is a suspected terrorist and provides detainees with their counsel of choice.

It cannot be sufficient for the Respondent to argue that the actions of U.S. authorities in Guantánamo are non-reviewable by any U.S. court because these actions took place outside the area of technical U.S. political sovereignty.[96] The detainees have been brought under duress by those same authorities and are within their exclusive control. In so arguing, the Respondent is in fact asserting that the checks and balances of the Constitution, so carefully constructed by the Framers and preserved for more than two centuries, can be set aside and denied to prisoners solely on the basis of a Presidential determination which is not subject to judicial review. Unchecked power always begets the greater exercise, and probable abuse, of that power. Courts have a duty to ensure that today's response to military crises cannot subsequently be used to justify an attack on human rights and due process.[97]

[96] The United States' total and absolute control over those detained as enemy combatants at Guantánamo renders it responsible pursuant to its obligations at international law. The concept of jurisdiction under the ICCPR, for example, is essentially territorial, but where, exceptionally, a State exercises effective control of foreign territory, that territory falls within Article 2(1) of the ICCPR and has extraterritorial application. The same is true under Article 1 of the ECHR. *See, e.g., Loizidou v. Turkey*, 23 Eur. H.R. Rep. 513 (1996); *Loizidou v. Turkey* (Preliminary Objections), 20 Eur. H.R. Rep. 99 (1995).

[97] *Amici* recall a distinguished foreigner whose comments on the potential for executive abuse at the Republic's infancy ring true today:

> I think that liberty is endangered when this power [of the majority] is checked by no obstacles which may retard its course, and force it to moderate its own vehemence. Unlimited power is in itself a bad and dangerous thing; human beings are not competent to exercise it with discretion; and God alone can be omnipotent, because his wisdom and his justice are always equal to his power. But no power upon earth is so worthy of honor for itself, or of reverential obedience to the rights which it represents, that I would consent to admit its uncontrolled and all-predominant authority.

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 306 (Henry Reeve trans., Schocken 1961) (1835).



### D. United States Courts Consistently Seek To Act In Harmony With International Law

This Court has long recognized that it is appropriate for U.S. law to be consistent with international law and custom.[98] In fact, members of this Court have recognized the importance of international human rights law to constitutional adjudication as a yardstick of the principles generally shared by the United States with other civilized nations.[99] Likewise, the senior constitutional courts in the

[98] Subject to the Constitution, customary international law and treaties are the law of the United States. U.S. CONST. art. VI, § 2; *Hurd v. Hodge*, 334 U.S. 24, 35 (1948) (striking down racially restrictive legislation as violative of public policy manifested in, *inter alia*, treaties); *Oyama v. California*, 332 U.S. 633, 649-50, 673 (1948) (relying on provisions of the United Nations Charter as a source of legal obligations and finding Alien Land Law invalid as inconsistent with the "high ideals" therein) (Black, Douglas, Murphy & Rutledge, JJ., concurring); *The Paquete Habana*, 175 U.S. 677 (1900); *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804).

[99] *Lawrence v. Texas*, 123 S. Ct. 2472 (2003). Members of this Court have remarked on the value of comparative perspective in judicial interpretation. *See, e.g.*, Justice Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. INT'L L. & POL. 35 (1996). Justice Stephen Breyer, *Changing Relationships Among European Constitutional Courts*, 21 CARDOZO L. REV. 1045, 1060 (2000) ("the nations we visited, like our own, attach great importance to the rule of law.... we can learn from their structural efforts.... I am certain that comparative constitutional study of substance and of structure is part of that task."). Justice Ruth Bader Ginsberg has made a similar observation:

> A prominent jurist put it this way 14 years ago: 'For nearly a century and a half, courts in the United States exercising the power of judicial review [for constitutionality] had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts

United Kingdom and other commonwealth countries refer to and use provisions of the generally recognized international human rights instruments—both incorporated and unincorporated—to interpret and apply domestic common law,[100] legislation,[101] and legal doctrines.[102]

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begin looking to the decisions of other constitutional courts to aid in their own deliberative process.'

Justice Ruth Bader Ginsburg, Remarks for the American Constitutional Society (Aug. 2, 2003), *quoting* William H. Rehnquist, Constitutional Courts-Comparative Remarks (1989), *reprinted in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

100 *Derbyshire County Council v. Times Newspapers*, [1992] Q.B. 770, 812 (Eng.) (noting that, although Article 10 of the European Convention on Human Rights is not incorporated into English law, "it may be resorted to in order to help resolve some uncertainty or ambiguity in municipal law"); *Attorney-General v. Guardian Newspapers* (No. 2), [1990] 1 A.C. 109, 134 (Eng.) (observing that the common law duty of confidence comported with Article 10 of the European Convention on Human Rights).

101 *See Waddington v. Miah*, [1974] 1 W.L.R. 692, 694 (Eng.) (observing that British immigration laws comport with Article 11(2) of the UDHR and the ECHR). *See also R. v. Sec'y State Home Dep't, ex parte Simms*, [2000] 2 A.C. 115, 130, 131-32 (Eng. H.L.) (noting that even when public powers are conferred by clear and unambiguous words, there is a presumption that the legislation conforms with the human rights treaties by which the U.K. is bound; legislature and executive are presumed to further, rather than to frustrate, international treaty obligations); *R. v. Sec'y State, ex parte Brind*, [1991] 1 A.C. 696 (Eng. H.L.) ("It is already well settled that, in construing any provisions in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the [European Convention for the Protection of Human Rights], the courts will presume that Parliament intended to legislate in conformity with the convention"); *Garland v. British Rail*, [1983] 2 A.C. 751 (Eng. H.L.) (finding that nothing short of an "express positive statement" in an Act of Parliament justified a court to construe a provision "in a manner inconsistent with a Community treaty obligation of the United Kingdom").

102 Australian, Canadian, English, and New Zealand courts look to international standards when applying the "legitimate expectations" principle to administrative decisions regarding compliance with unincorporated conventions. *See, e.g., Minister Immigration & Ethnic Affairs v. Teoh*, 128 A.L.R. 353 (Austl. 1995); *Baker v. Minister of*



While courts must take into account the exigencies of war and national emergency, a country's courts must never abdicate their constitutional role. It was an American Supreme Court Justice who reminded the British of this essential principle in the aftermath of the Second World War. Sir Winston Churchill argued that Nazi leaders should be shot upon their capture,[103] an outcome averted largely by the United States lobbying for the creation of the International Military Tribunal at Nürnberg. Justice Jackson, then Chief of Counsel for the United States, noted in his opening remarks to the court: "That four great nations flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to reason."[104]

The United States and its allies then faced a great enemy and had suffered appalling losses. In discussing what to do with war criminals, the United States' official position was premised on the rule of law:

> we could execute or otherwise punish them without a hearing. But undiscriminating executions or punishments without definite findings of guilt, fairly arrived at, would violate pledges repeatedly given, and would not set easily on the American

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*Citizenship*, [1999] 2 S.C.R. 817 (Can.); *R. v. Sec'y State, ex parte Ahmed & Others*, [1999] Imm. A.R. 22 (Eng. C.A.); *R. v. State Home Dep't, ex parte Behluli*, [1998] IAR 407 (Eng. C.A.) (Dublin Convention); *Tavita v. Minister Immigration*, 2 N.Z.L.R. 257 (N. Z. 1994).

103 7 MARTIN GILBERT, WINSTON S. CHURCHILL: ROAD TO VICTORY 1941-1945, 1201-02 (1986). *See also*, Chief Justice William H. Rehnquist, Dedication of the Robert H. Jackson Center (May 16, 2003) ("the Nuremberg Trials were surely superior to the summary court martial proceedings favored by some members of the administration and the summary executions initially favored by the British.").

104 Robert H. Jackson, Opening Statement Before the International Military Tribunal (Nov. 21, 1945).

> conscience or be remembered by our children with pride. The only other course is to determine the innocence or guilt of the accused after a hearing as dispassionate as the times and horrors we deal with will permit, and upon a record that will leave our reasons and motives clear.[105]

The Nürnberg trials were established between the victorious Allies and thus did not afford domestic constitutional protection. The United States, however, clearly understood that at a minimum, a trial and a public record were required—if not by the letter of the law, then by principles upon which the Republic was created.

## CONCLUSION

This case provides the Court with an opportunity to vindicate the rule of law under the Constitution and preserve the role of the courts in ensuring that the exercise of executive power over the detainees in Guantánamo will not be above the law. Petitioners' writs should be granted.

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105 Report of Robert H. Jackson To the President, June 7, 1945, DEP'T ST. BULL., June 10, 1945, at 1071, 1073. The report was released to the press by the White House with Presidential approval and was accepted by other governments as the official statement of the United States. It was subsequently placed before all of the delegations at the London Conference.



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